those that specifically granted Comerica claims against the estate or liens against estate property. *Weinstein, Eisen & Weiss, LLP v. Gill* (*In re Cooper Commons, LLC*), 430 F.3d 1215, 1219-1220 (9th Cir. 2005) ("it follows that any provisions of the financing agreement that Comerica might have bargained for or that helped to motivate its extension of credit are protected by § 364(e)"). The Court's determination is consistent with the legislative history for section 364(e), which section

> provides the same protection for credit extenders pending an appeal of an authorization to incur debt as is provided under section 363[m] for purchasers: the credit is not affected on appeal by reversal of the authorization unless the authorization and the incurring of the debt were stayed pending appeal. The protection runs to a good faith lender, whether or not he knew of the pendency of the appeal.

H.R.Rep. No. 595, 95th Cong., 2nd Sess. 347.

The question has been most directly addressed by the Sixth Circuit, beginning with *Unsecured Creditors' Committee v. First Nat'l Bank & Trust Co. of Escanaba* (*In re Ellingsen MacLean Oil Co., Inc.*), 834 F.2d 599 (6th Cir. 1987). In that case, the debtor borrowed funds from its existing lender and, as part of the financing agreement, agreed to settle all controversies regarding the validity of the lender's security interests by waiving any objections thereto. *Ellingsen*, 834 F.2d at 600-601. The Sixth Circuit noted that the challenged aspect of the financing was "part of the whole 'package' authorized under section 364(c)," *Id.* at 602, and concluded that it was entitled to section 364(e)'s protections. *Id.* at 604. "The proper recourse for the objecting creditor [was] to get the transaction stayed pending appeal." *Id.* at 604-605.

Similarly, in *New York Life Ins. Co. v. Revco D.S., Inc.* (*In re Revco D.S., Inc.*), 901 F.2d 1359 (6th Cir. 1990), the appellant generally supported the debtor obtaining a loan that was secured by a first-priority lien on assets on which other creditors held liens, but objected to the approval of the debtor paying the ..ow-junior secured lienholders periodic payments equal to the interest accruing on the debtor's prepetition obligations to such junior lienholders.[13] The appellant argued that the interim payments ordered by the bankruptcy court were severable from the rest of the financing order and were not protected from review under section 364(e). *Revco*, 901 F.2d at 1364. The Sixth Circuit rejected that argument.

The Sixth Circuit and Ninth Circuit are in agreement that when credit is extended in a manner that is consistent with section 364 of the Bankruptcy Code, *all* terms of the financing are entitled to protection under section 364(e). In an effort to persuade this Court to grant certiorari, WEW asserts that the Sixth and Ninth Circuit's holdings are contrary to those in the Eleventh, Seventh, and Third Circuits. In truth, none of the cases cited by WEW from those circuits address this issue.

Also in an effort to persuade this Court to grant certiorari, WEW argues that there is a split in the circuits as to whether the absence of a stay pending appeal necessarily requires dismissal of the appeal on mootness grounds. As noted above, WEW did not actually raise this

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[13] Section 364(d) provides that a priming lien may be given to a postpetition lender if there is "adequate protection" of the interest of the lienholder(s) whose secured interest(s) will become junior to the new lien. In *Revco*, such adequate protection took the form of periodic cash payments.

question before the Ninth Circuit. Further, although the Ninth Circuit mentioned that WEW failed to obtain a stay pending appeal, the Ninth Circuit did not actually make a ruling on the issue WEW seeks to litigate in this Court. In any event, the circuits are in agreement that when a lender extends credit authorized under section 364 in good faith, the proper recourse for the objecting creditor is to get the transaction stayed pending appeal.

A. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) APPLIES WHEN, AS HERE, FINANCING IS AUTHORIZED UNDER SECTION 364

The Eleventh Circuit case upon which WEW relies shows only that there is some disagreement on a completely different and specific question not at issue in this appeal – to wit, whether section 364(e) precludes an appellate court from examining whether cross-collateralization is authorized under section 364(c) or (d).[14] Section 364(c) provides that under certain circumstances the court may authorize a trustee or debtor-in-possession to obtain credit whereby the lender is given priority over administrative expenses, a security interest in property not otherwise subject to a lien, or a security interest in property where such security interest is junior to existing secured interests. Section 364(d) provides that under certain circumstances

[14] In the context of bankruptcy financing agreements, "cross-collateralization" occurs when a lender receives a security interest in postpetition assets to secure previously unsecured prepetition loans. Cross-collateralization is considered to be controversial and courts that do allow such provisions in financing agreements generally do so only in limited circumstances. *See In re Vanguard Diversified, Inc.*, 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983).

the court may authorize the trustee or debtor-in-possession to obtain credit whereby the lender is given a security interest in property where such security interest is senior to existing secured interests.

The disagreement as to that separate question is evidenced by the Ninth Circuit's decision in *Burchinal v. Central Washington Bank* (*In re Adam's Apple, Inc.*), 829 F.2d 1484 (9th Cir. 1987), and the Eleventh Circuit's decision in *Shapiro v. Saybrook Mfg. Co., Inc.* (*In re Saybrook Mfg. Co., Inc.*), 963 F.2d 1490 (11th Cir. 1992). In *Adam's Apple*, the bankruptcy court approved a financing arrangement which contained a cross-collateralization provision. The Ninth Circuit declined to address whether such a provision was authorized by section 364, but stated that to the extent such provisions exist in a debtor-in-possession financing agreement, "cross-collateralization clauses appear to be covered by section 364 and in turn subject to section 364(e)." *Adam's Apple*, 829 F.2d at 1488. On the other hand, in *Saybrook*, the Eleventh Circuit concluded that section 364, in authorizing the granting of postpetition liens to secure postpetition loans, does not authorize the granting of postpetition liens to secure prepetition loans and, as a result, cross-collateralization clauses are not covered by section 364 and, by extension, section 364(e) does not protect such liens. *Saybrook*, 963 F.2d at 1495. Accordingly, there may well be a split in the circuits as to whether cross-collateralization is authorized under section 364. Here, however, WEW's appeal does not involve a cross-collateralization challenge. WEW simply confuses the two circuits' different views on cross-collateralization as evidencing a disagreement as to the issue in this appeal.

In fact, the Eleventh Circuit acknowledges that section 364(e) applies "if the challenged lien or priority [in favor of the lender] was authorized under section 364." *Id.* at 1493. Here, WEW has not challenged any liens or priority granted to Comerica, the granting of which was authorized by the Bankruptcy Court under section 364.[15] WEW, like the appellant in *Ellingsen*, simply does not like one term of the overall package negotiated by the Trustee as an amendment to the Third Stipulation. As a result, since there is no dispute as to whether the financing from Comerica was provided under section 364, *Saybrook* supports the Ninth Circuit's determination that WEW's appeal is moot, and does not evidence any split in the circuits as to the narrow question actually at issue in this appeal.

B. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) APPLIES WHEN, AS HERE, THE LENDER ACTS IN GOOD FAITH

The second case relied upon by WEW, *In re EDC Holding Co.*, 676 F.2d 945 (7th Cir. 1982), also does not support WEW's claim that there is a split in the circuits. According to WEW, "Instead of limiting its analysis to the type of order at hand, the Seventh Circuit focused its attention first on whether the questioned provision in the loan was permissible." In fact, the opposite is true.

The Seventh Circuit stated that if the lender "was acting in good faith . . . the issue of validity [of the court's

[15] WEW itself negotiated the initial financing stipulations which gave Comerica a lien on all credit extended by Comerica postpetition, and then sought approval of such stipulations under section 364.

order] is therefore moot." *EDC*, 676 F.2d at 947. Thus, the Seventh Circuit actually first turned not to whether the questioned provision in the loan was permissible, but rather to the question of whether the lender in that case had acted in good faith. If the lender did act in good faith, then "[t]he proper recourse for the objecting creditor [was] to get the transaction stayed pending appeal." *Id.* at 947 (citing *In re Roberts Farms, Inc.*, 652 F.2d 793, 796-798 (9th Cir. 1981)). It was only *after* finding that the lender had not acted in good faith (in which case § 364(e) could not, by its terms, apply) that the Seventh Circuit turned to whether the provision at issue in that case was improper.

In the case at bench, the Bankruptcy Court made a specific factual finding of good faith for purposes of § 364(e). WEW did *not* challenge that finding on appeal, and the Ninth Circuit ruled that the Bankruptcy Court's finding was proper. As noted in *EDC*, the proper recourse for WEW was "to get the transaction stayed pending appeal." WEW having failed to do so, the Ninth Circuit's determination that WEW's appeal is moot was consistent with the Seventh Circuit's opinion in *EDC*. Moreover, the Seventh Circuit's opinion in *EDC* had nothing to do with whether section 364(e) protects some, instead of all, provisions of financing provided under section 364, and therefore cannot evidence any split in the circuits on that issue.

Further, WEW relies on *EDC* to support its argument that there is a split in the circuits as to whether "absence of a stay pending appeal of a bankruptcy financing order necessarily require[s] an outright dismissal for mootness."[16]

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[16] As noted above, Respondents submit that this issue was not raised by WEW before the Ninth Circuit, or addressed by the Ninth

(Continued on following page)

According to WEW, "even absent a stay, an offensive provision in a lending agreement was reversed." However, *EDC* actually contradicts WEW's argument in this appeal:

> The bankruptcy judge's order was never stayed. Therefore, if in lending [the debtor funds the lender] was acting in good faith, its priority could not be affected by the validity of the order and the issue of validity is therefore moot . . . . But if [the lender] was not acting in good faith, the [objecting party] was entitled to have the merits of its objection to the grant of priority adjudicated. . . . The proper recourse for the objecting creditor is to get the transaction stayed pending appeal.

EDC, 676 F.2d at 947. Therefore, under *EDC*, when credit is extended in good faith pursuant to section 364, an appeal is moot absent a stay pending appeal.

C. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS THAT SECTION 364(E) MAY APPLY WHEN, AS HERE, THE AUTHORIZED FINANCING HAS BEEN FULLY DISBURSED BY THE LENDER

The third and final case relied upon by WEW, *Resolution Trust Corp. v. Swedeland Dev. Group, Inc.* (*In re Swedeland Dev. Group, Inc.*), 16 F.3d 552 (3rd Cir. 1994), also supports the Ninth Circuit's decision in this case. WEW incorrectly claims that in *Swedeland*, the Third Circuit aligned itself with the Seventh Circuit and "expressly rejected the analysis of the Sixth and Ninth Circuits." According to WEW, "the Third Circuit allowed

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Circuit in its opinion, and therefore is not properly raised as a question presented in this appeal.

an appellate challenge to the questioned provision, even absent a stay, because the provision could not have had its roots in § 364."

The Third Circuit actually addressed two separate orders of the Bankruptcy Court – one entered in March 1992 (which WEW ignores) and another entered in April 1992. The lending authorized by the first order had been fully disbursed by the lender and the debtor had expended the funds; in contrast, the lending authorized by the second order had not been fully disbursed. *Swedeland*, 16 F.3d at 557. This distinction was key – the Court found that the appeal from the March 1992 order was moot, while the appeal from the April 1992 order was not moot because not all of the funds had been disbursed. As here, there was no challenge to the lenders' good faith. *Id.* at 559.

The Third Circuit first addressed the April 1992 order, and determined that the appeal therefrom was not moot. In doing so, the Third Circuit did, indeed, distinguish its approach from that of the Sixth and Ninth Circuits; however, the disagreement related to whether an appeal was moot when some, but not all, of the funds authorized to be lent were disbursed before the reversal. *Id.* at 561-562 ("[W]e acknowledge that there is some support in cases cited by Swedeland from the Courts of Appeals for the Sixth and Ninth Circuits for a contrary holding predicated on the ground that some of the funds authorized to be lent by that order were disbursed before the reversal.").

In contrast, there was no such disagreement in the case of the March 1992 order, where the loan had been fully disbursed. Therefore, the Third Circuit determined that the appeal of the March 1992 order *was* moot. *Id.* at 562. In fact, the Third Circuit stated that "[t]here is, of

course, *no doubt that under section 364(e) a stay is required*, except in cases in which the post-petition lender makes no disbursements before the district court decides the appeal on the merits, *if the party appealing from a section 364(d) order seeks to preserve its position completely.*" *Id.* at 562 n.10 (emphasis added).

In the case at bench, Comerica disbursed all of the funds that were subject to the financing arrangement with the Trustee. Further, the Trustee's Administrative Fund has been spent and the Trustee and his professionals are still owed hundreds of thousands of dollars for services provided and with respect to which the Court has entered orders awarding fees and costs therefor. Under such circumstances, the Third Circuit's opinion in *Swedeland* supports the Ninth Circuit's decision in this case that WEW's appeal is moot,[17] and does not evidence any disagreement among the circuits as to the questions presented in this appeal.

In fact, although the Third Circuit in *Swedeland* did not directly address the question of whether section 364(e) protects some, instead of all, provisions of financing provided under section 364, the decision actually appears to be consistent with the positions of the Sixth and Ninth Circuits. With respect to the March 1992 financing, the

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[17] Similarly, in *Boullioun Aircraft Holding Co., Inc. v. Smith Management (In re Western Pacific Airlines, Inc.)*, 181 F.3d 1191 (10th Cir. 1999), the lender's funds had been fully distributed in reliance upon the financing agreement. *Western Pacific*, 181 F.3d at 1196. Addressing one of the arguments raised by the appellant therein, the Tenth Circuit noted that the "*Swedeland* court found one of several financing orders . . . not moot on the grounds that funds under that order remained undistributed." *Id.* However, since all the funds in its case had been fully distributed, the Tenth Circuit determined that the lender was entitled to full protection under section 364(e). *Id.*

Third Circuit noted that the agreement provided for the establishment of an interest reserve for the benefit of the lender, and ruled that "voiding the reserve would impair the security for which [the lender] bargained and thus would be inconsistent with the protection afforded it by section 364(e)." Thus, after determining that the financing approved in the March 1992 order was protected by section 364(e), the Third Circuit determined that section 364(e) also protected those provisions of the agreement relating to the interest reserve.[18] Accordingly, *Swedeland* undercuts WEW's claim that there is a split in the circuits as to whether section 364(e) protects some, instead of all, provisions of financing provided under section 364.

D. THE TRUSTEE'S FINANCING ARRANGEMENT WITH COMERICA WAS PROPER

Notwithstanding that WEW did not appeal the Bankruptcy Court's finding of good faith, WEW disparages the Sixth and Ninth Circuits for, in WEW's view, allowing a debtor-in-possession or trustee to "team up" with a lender to include improper provisions in a financing order. However, the authorities are clear that if a party such as WEW wants to ensure that its challenge to all or part of a financing order is not moot under section 364(e), the proper recourse is for the party to seek a stay pending appeal. *Adam's Apple*, 829 F.2d at 1487-1488; *Ellingsen*, 834 F.2d at 604-605; *EDC*, 676 F.2d at 947; *Credit Alliance Corp. v. Dunning-Ray Ins. Agency, Inc.* (*In re Blumer*), 66 B.R. 109 (9th Cir. BAP 1986) ("Unless a stay has been

[18] The Third Circuit did so even though it believed that the appellant "would obtain effective relief by the voiding of the reserve." *Swedeland*, 16 F.3d at 563.

granted pending appeal, a reversal or modification of the court order on appeal does not affect the validity of a good faith creditor's loan or any liens or priorities securing the loan."); *Swedeland*, 16 F.3d at 562 n.10. Nevertheless, WEW never sought such a stay. Having failed to exercise all potential remedies available, WEW cannot now blame the courts for the fact that WEW's appeal is moot.

WEW's failure to even seek a stay is particularly remarkable given its claim that the Trustee's Administrative Fund is improper under the Ninth Circuit's own precedent in *Feder v. Lazar* (*In re Lazar*), 83 F.3d 306, 310 (9th Cir. 1996).[19] If the Trustee's Administrative Fund is clearly improper, it should have been easy for WEW to obtain a stay. In truth, the facts in *Lazar* are distinguishable from the facts in this case since *Lazar* involved the rights of competing administrative claimants to *unencumbered* assets of the estate. In contrast, cases involving facts such as those found here – where the funds are fully encumbered by liens in favor of Comerica and junior lienholders and WEW has no right to recover any such funds – support the Trustee and Comerica's position. *See*

[19] WEW asserts that "disparate treatment of equally ranked administrative claimants . . . is plainly improper under the Bankruptcy Code." In this case, the body of administrative claimants include subcontractors and similar persons who participated in the construction of the Desmond and rehabilitation of the fountain, and who have all received payment for their services. Notably, WEW does *not* assert that it is entitled to share in the distributions to all of those equally ranked creditors (who would, then, be required to return compensation paid to them). Moreover, given that a remedy sought by WEW in this case is to share pro rata in the Trustee's Administrative Fund, WEW has no problem with the establishment of such a fund so long as WEW itself benefits therefrom. Thus, despite its indignation, WEW appears to be willing to allow some of the "mischief" it alleges that the Ninth Circuit is choosing to ignore.

In re Hotel Syracuse, Inc., 275 B.R. 679 (Bankr. N.D.N.Y. 2002) (secured creditor consented to the payment of the debtor's counsel's fees from its collateral, but not to payment of the committee counsel's fees); *In re American Resources Management Corp.*, 51 B.R. 713 (Bankr. D. Utah 1985) (secured creditor permitted a portion of its cash collateral to be used to pay fees and expenses of the trustee and his counsel, while allowing a smaller portion to be used to pay the fees for the attorneys and accountants of the creditors' committee).

In this case, Comerica loaned additional funds to the Trustee to complete construction of the Desmond and the Fountain. Comerica retained a lien on such funds until spent by the Trustee, and Comerica was afforded a first-priority lien on proceeds from the sale of units at the Desmond. It is undisputed that Comerica was (and remains) undersecured; further, even if the Trustee had been able to receive sufficient sale proceeds to pay Comerica in full, there were and are a number of creditors holding junior liens against the sale proceeds. As a result, but for the existence of the Trustee's Administrative Fund, none of the funds loaned to the Trustee by Comerica or the sale proceeds would be available to pay the Trustee and his professionals. Under such circumstances, Courts recognize the ability of a secured creditor to control the use of its own funds.

IV.

CONCLUSION

There is no split in the circuits on the question at issue in this appeal; the only courts to address this narrow issue are in agreement. Further, the cases relied upon by

WEW actually support the Ninth Circuit's determination that WEW's appeal is moot pursuant to section 364(e) of the Code. Accordingly, the Trustee and Comerica request that WEW's petition for certiorari be denied.

Respectfully submitted,

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No. 05-768

In The Supreme Court of the United States

WEINSTEIN, EISEN & WEISS LLP,

Petitioner,

v.

DAVID A. GILL, CHAPTER 11 TRUSTEE; COMERICA BANK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO JOINT BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The Petition seeks a review of the Ninth Circuit's interpretation of the statutory mootness provision in 11 U.S.C. § 364(e), about which the circuits are sharply split. The question is whether a challenge to a questionable provision concerning the usage of bankruptcy funds escapes judicial scrutiny merely because it is included in an unstayed financing order. In the case at bench, the Ninth Circuit in *Cooper Commons* dismissed the appeal as moot, holding that section 364(e) automatically mooted any challenge to a provision for special treatment of selected administrative expenses because it was included in a financing order. However, several other circuits have applied § 364(e) exactly the opposite way, specifically requiring scrutiny of the challenged provision before determining if a challenge to it is moot.

The Respondents contend that the court in *Cooper Commons* did not require an outright dismissal for mootness in the absence of a stay, and hence, according to Respondents, the mootness issue is not ripe for review. In fact, the Ninth Circuit actually dismissed Petitioner's appeal as moot without reviewing its substantive objections solely because Petitioner had failed to obtain a stay. Therefore, this issue is not only "ripe for review", it is, in fact, the precise focus of the circuit split.

In addition, although the Respondents contend that the Eleventh, Seventh and the Third Circuits are not in conflict with the Ninth Circuit (or the Sixth), plainly they are. Petitioner's reply highlights language taken directly from those circuits' decisions which reveals that there is indeed a sharp split among them on this very issue. First, the conclusions reached by the Eleventh and Ninth Circuits

are in direct conflict with regards to whether or not the court should scrutinize the financing provision(s) in issue *before* making a determination on the mootness issue. Specifically, the Eleventh Circuit in *Saybrook* first analyzed the provision in question to see if it was something "within section 364" (*i.e.*, truly a financing feature, as compared to something foreign that is put there solely to escape review by invocation of mootness). Something not based in section 364 is not subject to mootness. The Ninth Circuit handled the same issue exactly the opposite way: having been presented a document entitled "financing order", it concluded that *any* dispute, about *anything* in it, was moot, regardless of what it purported to be and whether it actually had anything to do with financing or section 364. Thus, there is a sharp split on this very important issue that dictates the outer boundaries of what can be forced through the bankruptcy system without judicial scrutiny.

Similarly, the Respondents argue that the Seventh Circuit's decision in *EDC Holding* does not support Petitioner's claim that there is a split among the circuits. Specifically, Respondents assert that the Seventh Circuit did not first scrutinize the loan transaction itself, but rather analyzed first whether the lender had acted in "good faith". However, direct language from the case reveals that the Seventh Circuit first scrutinized the challenged provision to determine if the loan was permissible. The Seventh Circuit reasoned that if the loan was improper under the Bankruptcy Code, the lender could not have been acting in "good faith". Therefore, the Seventh Circuit's initial attention was on the finance provision, which shows that its interpretation of how to apply the

mootness clause is also in direct conflict with the Ninth Circuit's.

Finally, Respondents argue that there is no disagreement between the Third and Ninth Circuits because both jurisdictions refer to the availability (or unavailability) of funds in making the determination as to whether an appeal should be held moot. However, the Ninth Circuit never referred to, much less relied upon, the availability of funds and this issue was never raised in *Cooper Commons*. Furthermore, the Third Circuit's view, reflected in *Swedeland*, is aligned with both the Seventh and Eleventh Circuits' views, since the Third Circuit distinctly held that section 364 did not automatically moot an appeal merely because no stay was in place, notwithstanding that it was a financing order that was under scrutiny.

For the foregoing reasons and as described below in greater detail, this Court is urged to grant certiorari so it can resolve the sharp split among the circuits on a very important public issue that affects billions of dollars of financing transactions in the business bankruptcy environment every year.

REPLY TO JOINT BRIEF IN OPPOSITION

A. The Issue of How to Apply the Mootness Provision Is Ripe for Review.

Respondents contend that the issue of "mootness" is not ripe for review because the Ninth Circuit's decision did not discuss whether the absence of a stay pending appeal necessarily required an outright dismissal for mootness. The Respondents argue that "the Ninth Circuit merely commented that since WEW has failed to secure a stay, all

that remains under section 364(e) is to review whether Coamerica acted in good faith". *Respondents' Joint Brief in Opposition* ("Opposition"), at p. ii n. 3.

Whether the Ninth Circuit in *Cooper Commons* "actually discussed" an automatic dismissal is irrelevant because the Ninth Circuit indisputably precluded substantive review and dismissed Petitioner's appeal due to the absence of a stay. *Weinstein, Eisen & Weiss, LLP v. Gill, et al. (In re Cooper Commons LLC)*, 424 F.3d 963, 970 (9th Cir. 2005) ("[t]he Weinstein firm['s] . . . substantive objections to the agreement are moot"). The issue of how the mootness statute is to be applied presents a sharp split that is extremely important and entirely ripe for review in the circumstances presented here.

B. The Eleventh Circuit Is in Direct Conflict with the Ninth Circuit with Regards to Requiring Scrutiny of the Financing Provision Prior to a Determination on the Mootness Issue.

The Respondents contend that WEW relies on cases which only show "some disagreement", and even then, only as to a question not at issue in this appeal, namely whether section 364(e) precludes an appellate court from examining whether cross-collaterization is authorized under section 364(c) or (d). Opposition at 9-10.

The Respondents further contend that both the Ninth and Eleventh Circuits in *Burchinal v. Central Washington Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484 (9th Cir. 1987) and *Shapiro v. Saybrook Manufacturing Co., Inc. (In re Saybrook Manufacturing Co., Inc.)*, 963 F.2d 1490 (11th Cir. 1992), respectively, only considered whether cross-collateralization was authorized under section 364. They

argue that WEW's appeal did not involve a cross-collateralization challenge and, therefore, those two cases are inapplicable and that *Adams Apple* simply supports the holding in *Saybrook*. Opposition at 11.

The Respondents' reading of *Adam's Apple* and *Saybrook* is artificially narrow and fails to give recognition to the precedential value of opinions by the circuit courts of appeal. Neither of these cases is merely about "cross-collateralization" and both are about the reach, meaning and effect of the mootness provision in section 364(e). In fact, even though *Cooper Commons* did not have anything to do with the issue of cross-collateralization, the Ninth Circuit specifically referred to *Adam's Apple* as the basis for its discussion of section 364(e). *Cooper Commons*, 424 F.3d at 968. Obviously, if *Adams Apple* was only a cross-collateralization case, the Ninth Circuit would not have relied on it in *Cooper Commons*.

As set forth in the certiorari petition, the Eleventh Circuit in *Saybrook* refused to read section 364(e) to automatically moot anything and everything labeled or included in a "financing order". Specifically, the Eleventh Circuit declined to determine if the appeal was moot under 364(e) until it first addressed the substantive issue asserted to be moot – which happened to be whether cross-collateralization was authorized under section 364.[1] On

[1] Furthermore, by this correct analysis, it is seen that the fact that the dispute in *Saybrook* was over cross-collateralization is almost secondary. It could have been *any* disputed point that was not central to financing – like ours; or those related to fees of the debtor's attorney, that they squeezed into the financing order. This shows that the case *was not* about cross-collateralization only. The case was about mootness and whether a court can look at the substantive question at all. Which,

(Continued on following page)

the other hand, the Ninth Circuit in *Adams Apple* (and again in *Cooper Commons*) reviewed the "mootness" issue first, before deciding on the validity of the financing provision – and thereby precluded a review of the "financing provision" altogether. This reading of section 364(e) allowed the mootness question to prevent any examination of the substantive issue at all, no matter how offensive or irregular it might be. *See Adams Apple*, 829 F.2d at 1489.

In *Saybrook*, certain creditors objected to the debtor's intent to "cross-collaterize" the lender's pre-petition debt with unencumbered property. After the district court dismissed the appeal as moot because the objecting creditors failed to obtain a stay, the Eleventh Circuit reversed and held that the appeal was *not* moot because cross-collateralization was not authorized under the Bankruptcy Code and could not escape scrutiny merely because it was grafted into a financing order. 963 F.2d at 1496. It is thus clear that the *Saybrook* court used an approach exactly opposite to the one that the Ninth Circuit used in *Adam's Apple* and here, since the Ninth Circuit dismissed the appeals in the absence of a stay and expressly declined to decide whether cross-collateralization or self-interested categorization of administrative expenses were wrongful provisions. *See Adam's Apple*, 829 F.2d at 1489 n. 6, 1491 ("[w]e dismiss the appeal as moot because our consideration of the merits is barred by 11 U.S.C. § 364(e)); *see also*, *Saybrook*, 963 F.2d at 1493-94 ("[l]ike in Adams Apple, the issue in *In re Elingsen* was whether section 364(e) rendered an appeal moot because the appellants failed to obtain a stay"). Therefore, the *Saybrook* decision simply

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of several possible substantive questions happens to be in play, is secondary.

does not "support the Ninth Circuit's determination that WEW's appeal is moot . . . " Opposition at 11. The Ninth and Eleventh Circuits are directly in conflict on the operation of this federal statute.

C. The Seventh Circuit Is in Direct Conflict with the Ninth Circuit with Regards to the Issue of How the Lender's Good Faith Is Examined in Applying the Mootness Statute.

Respondents assert that the Seventh Circuit is aligned with the Ninth Circuit, and that the Seventh Circuit did not first turn to the issue as to whether the questioned provision in the loan was permissible, but rather, to the issue of whether the lender had acted in good faith. Opposition at 11-12. This is simply a misreading of the case.

In *In re EDC Holding Co.*, 676 F.2d 945, 949 (7th Cir. 1982), even though the objecting creditor failed to obtain a stay, the Seventh Circuit reversed the order of the bankruptcy judge approving the provision in the lending agreement. The court did not simply first determine whether or not the lender had acted in "good faith", but rather, the court scrutinized the transaction itself to determine if the loan was permissible. This is perfectly analogous to the Eleventh Circuit's initial assessment of the propriety of the cross-collateralization provision. The relevant language in *EDC* is as follows:

> Where it is evident from the loan agreement itself that the transaction has an intended effect that is improper under the Bankruptcy Code, the lender is not in good faith, and it is irrelevant what the improper purpose is.

Id. at 948.

It is certainly clear from the court's language that the Seventh Circuit did not first turn to the issue of "good faith". Rather, the court turned first to the loan provisions being attacked to ascertain if they were improper under the Bankruptcy Code. From that, it concluded that the lender could be found not to have entered into the transaction in "good faith".[2] Again, Respondents have simply misconstrued this case and the two circuits are sharply conflicted.

D. Respondents' Reference to the Availability of Funds Is a Red Herring.

The availability of funds in the subject loan has no significance in the circumstances of our case. The Respondents rely on the Third Circuit's decision in *The Resolution Trust Corporation v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.)*, 16 F.3d 552, 562-63 (3rd Cir. 1994), which held that an appeal over the subject March 1992 financing order was moot because the court could not fashion appropriate relief where all funds had been disbursed. That the Third Circuit so held is irrelevant here and certainly does not prove there is no circuit split on the issue(s) actually raised in this case. Respondents argue that Petitioner's appeal is moot because "[i]n the case at bench, Comerica disbursed all of the funds that were subject to the financing arrangement with

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[2] Regardless of whether or not the Seventh Circuit first scrutinized the issue of "good faith" or required scrutiny of the challenged loan provision, the end result is the same in that the court was required to examine the integrity of the lending provision. Unlike the Ninth Circuit, the Seventh Circuit did not, under any circumstances, require an automatic mootness with regard to the substantive issues in the case for an unstayed appeal.

the Trustee". Opposition at 15. However, that was never the basis for the conclusion reached by the Ninth Circuit, and the court never relied upon the availability (or unavailability) of funds to determine whether or not this appeal was moot. Moreover, Respondents never made this argument below and the record does not support their contention here.[3]

The Third Circuit did, however, make rulings that are in direct conflict with the Ninth Circuit's holding. For instance, it is clear that the Ninth Circuit in *Cooper Commons* held that section 364(e) automatically mooted any appeal of a financing order where a stay had not been obtained, thereby precluding any review of the provisions creating the Administrative Fund and the Fee Disbursement provision even if they were improper or even illegal. 424 F.3d at 969-70. On the other hand, the Third Circuit distinctly held that section 364 did not automatically moot such appeals in circumstances where no stay had been obtained.

> Thus, we start our discussion by referring to section 364(e), the source of [debtor's] mootness argument. That section does not, in itself, suggest that an appeal from an order authorizing the creation of a . . . lien under 364(d) should be dismissed by reason of mootness when an appellant fails to obtain a stay pending an appeal. Indeed, section 364(e) never mentions that an appeal may be dismissed if a stay is not obtained.

Swedeland, 16 F.3d at 559.

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[3] There is no evidence or any record in the Ninth Circuit that 100% of the funds were disbursed. Obviously, the Ninth Circuit could not have used that "fact".